No. 14921

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL FIRE AND CASUALTY INSURANCE COMPANY,

Appellant,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, and EMPLOYERS' MUTUAL CASUALTY CO. OF DES MOINES,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF FOR J. J. O'LEARY, *Deputy Commissioner*

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INDEX

TABLE OF CASES

STATUTES

RULES

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STATEMENT OF CASE

This cause arose upon a complaint for judicial review of a compensation order filed by the appellee Deputy Commissioner O'Leary on January 19, 1955 pursuant to the provision of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. Sec. 901 et seq. Judicial review is authorized by section 21(b) of said Act, 33 U.S.C. Sec. 921 (b).

In said compensation order, the deputy commissioner awarded compensation to the employee (hereinafter called "claimant") on account of a back injury sustained on October 10, 1953 while employed by the Northern Stevedoring and Handling Corporation. The deputy commissioner specifically found that "the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability rather than the minor injury which he sustained on May 30, 1951, while in the employ of the employer abovenamed". The appellee Employers' Mutual Casualty Company was the insurer of the employer at the time of the 1951 injury while the appellant Continental Fire and Casualty Insurance Company was the insurer at the time of the 1953 injury.

[The employee has no apparent interest in this litigation whatever. It is immaterial which insurance company pays the compensation. Presumably he was persuaded to "take sides" by the letter sent to him on August 8, 1955 by the attorney for the appellant (R. 45)* in which it was stated that his name was included as party plaintiff in an action brought by the appellant-insurer to set aside the award and that the attorneys for the deputy commissioner and the other insurance company "have made a motion asking that

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*R. refers to the printed Transcript of Record.

you be dismissed as a party plaintiff in this case because your interest may be adverse to both the insurance companies and a ruling on behalf of either insurance company might be to your disadvantage."]

THE COMPENSATION ORDER

In the compensation order complained of, the deputy commissioner found the facts to be in part as follows:

> "That on the 10th day of October, 1953, the claimant above named was in the employ of the employer above named at Seward, in the Territory of Alaska, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Continental Fire and Casualty Insurance Corporation; that on said day, the claimant herein, while performing service as a Longshoreman for the employer and engaged in discharging cargo from the SS Seafair, which was afloat at the Army Dock, sustained personal injury resulting in his disability when, while lifting a crate weighing about four or five hundred pounds in company with three other employees he experienced a sudden pain in his lower back and legs; that he was admitted to the Seward General Hospital on October 11, 1953, where he remained until October 31, 1953, when he was transferred to the Providence Hospital in Seattle, Washington, and on November 13, 1953, a sub-total laminectomy and fusion of the lumbosacral area of his spine was performed; * * * that as a result of the injury sustained, the claimant was wholly disabled from

October 10, 1953, to September 30, 1954, inclusive, and he is entitled to 50-6/7 weeks' compensation at $35.00 for such temporary total disability; that beginning October 1, 1954, the disability of the claimant became permanent in character causing a loss of wage-earning capacity equivalent to 30% of his average weekly wage at the time of his injury, and he is entitled to compensation at the rate of $20.00 per week (⅔ of the difference between his average weekly wage of $100.00 at the time of his injury and his reduced wage-earning capacity of $70.00 per week) for such permanent partial disability; * * *

"That on November 13, 1953, the claimant filed a claim for compensation in the office of the undersigned deputy commissioner alleging that on May 30, 1951, while in the employ of the employer above named he sustained an injury while engaged in handling lumber aboard the SS 'Seafair' which was afloat at Seward, Alaska, and that on said date, while using a peavey on a timber, the peavey slipped causing him to fall backwards and to strike his back against a piece of timber, in consequence of which he is reported to have sustained a strained back; that no report of said injury was filed with the undersigned deputy commissioner by the employer until January 25, 1954; that the injury was, however, reported to the Alaska Industrial Board at Juneau, Alaska, and the claimant was paid compensation in the amount of $35.75 for temporary total disability from May 30, 1951 to June 5, 1951; that the medical reports submitted in connection with said injury indicated the claimant suffered a strained back; that subsequent to his return to work on or about June 6, 1951, the claimant was able to work whenever work was available although he had at various times experienced recurrent back pain; that the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent dis-

ability rather than the minor injury which he sustained on May 30, 1951, while in the employ of the employer above named."

The court below sustained said compensation order. This appeal followed.

QUESTION PRESENTED

In paragraph XVI of the complaint it is alleged:

"That it is admitted by the parties hereto that plaintiff Caldwell sustained an injury on May 30, 1951, while employed as a longshoreman on the SS 'Seafair' at Seward, Alaska, and that on October 10, 1953, he sustained another injury to his back and spine while employed by the same employer while working aboard the SS 'Seafair' at Seward, Alaska. The question presented is whether it was the duty of the deputy commissioner to adjudicate plaintiff Caldwell's claim of back injury of May 30, 1951, when said claim was filed in his office to determine the plaintiff's time loss as a result of said injury, and also to determine the permanent partial disability which the plaintiff suffered to his spine as a result of said injury, and treatment to which he was entitled as a result of said injury.

"*It is the plaintiff's position that the deputy commissioner was duty-bound to adjudicate plaintiff's claim of injury of May 30, 1951*, and to determine his time loss, permanent partial disability and treatment he was entitled to receive as a result of said injury, *before he adjudicated the claim of injury of October 10, 1953*, and made the award referred to herein." (Italics supplied)

The only question presented in the court below

was whether the deputy commissioner was required to adjudicate the claim for the 1951 injury before he adjudicated the claim for the 1953 injury. In this court appellant-insurer attempts to raise additional issues to which we shall refer. However it is a well recognized principle that a litigant may not raise issues on appeal which were not raised below. *Moore Dry Dock Company v. Pillsbury*, 169 F. 2d 988 (C.A. 9, 1948); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 251.

THE EVIDENCE

The complaint does not challenge the Findings of Fact made by the deputy commissioner in his compensation order. The resume' of the evidence given below is for the purpose, not of showing that the findings as to the two injuries are supported by evidence but merely for the purpose of familiarizing the court with the facts in the case.

At the hearing before the deputy commissioner on September 10, 1954 *Clarence L. Caldwell*, the claimant, testified in part as follows:

That on May 30, 1951 he was injured when a peavey slipped as he was trying to pry apart two bundles and he went over backwards, striking his back on a bundle of lumber or plywood or plasterboard

(App. 69);* that following his fall on May 30 1951 he worked the rest of that shift, and on the next day (he believed it was) he went to see Dr. Shelton who put him in Seward General Hospital (App. 70); that he was in the hospital five days and upon his return to work he had backache and pains when he got into certain positions (App. 71); that he did not continue under the care of Dr. Shelton (App. 71); that there were days the "job was too hard" for him and he would go home (App. 71); that after seeing a Dr. Sellers who told him it was his sacroiliac that was giving him trouble he got a back brace, in February or March of 1952 (App. 72); that on October 10, 1953 he helped to lift a crate that probably had a little more weight than he had lifted at other times and he "seemed to lose control of everything below the hips"; that the crate contained a deep freezer which weighed four or five hundred pounds (App. 73); [There was basis for the deputy commissioner doubting that the 1953 injury resulted merely from lifting a little more weight than usual in view of the claimant's brother's testimony that the injury occurred when "a load fell off a four-wheeler" App. 28]; that he went home right away, went to bed and the next morning went to the hospital where he consulted Dr. Deisher; that he remained under Dr.

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*App. refers to the appendix attached to appellant's brief.

Deisher's care until he came to Seattle on November 2, 1953 where he was treated by Dr. McLemore and an operation on his back was performed on November 13th (App. 73, 74); that he is still under Dr. McLemore's care who has not released him for work (App. 74); that he treated the injury of May 30, 1951 as a minor injury and that is how the doctor treated it (App. 76); that after such sprain *he did not consult Dr. Shelton for two days* [claimant having previously testified he believed he consulted Dr. Shelton the next day]; that he went to Dr. Shelton's office on that occasion and Dr. Shelton told him he had a slight sprain *of the muscles* of the back (App. 77); that he left the hospital on June 6, 1951 at which time Dr. Shelton advised him he could return to work (App. 77); that stevedoring work in Seward is not daily work but depends upon how many boats are in; that in some months stevedores work only two or three days (App. 78); that the first physician he consulted after he had consulted Dr. Shelton was Dr. Sellers, *a period of eight or nine months later*, although he was experiencing almost constant daily pain (App. 81); that in lifting the crate onto the deck of the ship (the 1953 injury) he turned away from it so as to give him "more room to step over" and experienced a sharp pain in the lower part of his back (about at the belt line) and in his legs (App. 87); that the pain was in "the small of" his back

and was shooting down his hip and legs (App. 88); that the pain was severe and more than he had been having because he had lifted too much weight; that the injury of October 10, 1953 occurred about 4:00 o'clock and he went home about 4:30 after waiting for the dispatcher to arrive and without finishing the shift (App. 89); that he went to the hospital the next morning where he remained about three weeks and where he was placed in a body cast before being sent to Seattle (App. 89); that x-rays were taken at the Seward hospital and he was in a body cast when he arrived in Seattle (App. 90); that Dr. Sellers gave him treatment for his sacroiliac, snapping his back "more or less like a chiropractor would" (App. 96); that such treatments (about three in number) seemed at times to ease his back condition temporarily (App. 97); that Dr. Sellers also prescribed heat treatments and hot baths (App. 97); that, other than recommending the use of a back brace and a heat pad, Dr. Sellers prescribed no other treatment (App. 102).

Dr. Ira O. McLemore, a witness called by Continental (the insurer in 1953) testified in effect that he examined the claimant at Providence Hospital, Seattle, on November 2, 1953, x-rays were taken which disclosed evidence of partial lumbarization of the first sacral segment and a spinal (pantopaque) study was made on November 5th (App. 107, 110, 111); that a

filling defect between the 5th and 6th lumbar vertebrae was noted which he felt was due to a rupture of the nucleus pulposus, and he recommended a subtotal laminectomy, removal of the nucleus, and a fusion of this area, due to the fact there was the pre-existing malformation, which operation was performed on November 11th; that certain definite adhesions appeared about the nerve roots with evidence of the previous malformation as noted in the x-rays (App. 111); that he thinks the claimant's injury of May 30, 1951 had a bearing on claimant's condition on November 2, 1953 because the history given by the claimant indicates he had not completely recovered from its effects and claimant had *additional injuries* superimposed on the condition (in the accident of October 10, 1953) (App. 113, 114); that claimant had two conditions—a ruptured nucleus with adhesions about the nerve roots, and the malformation of the spine the cause of which is an inherent weakness of the area with which back and leg pains are frequently associated (App. 114); that, while he thinks the adhesions existed for some period of time, they cannot tell at surgery when they did occur (App. 115); that he thinks claimant's pain down his leg, following the May 30, 1951 strain, was due to the adhesions (App. 116); that he thinks the adhesions would be associated with the accident of May 30, 1951 (App. 116); that he does not know of

his own knowledge of the extent of injury from the May 30, 1951 injury (App. 117); that following claimant's second injury of October 10, 1953 claimant was in a condition of total disability; that when he first examined claimant he suspected there might be present a herniated disc (App. 118); that, although atrophy is sometimes present in such cases, he has no notation of finding atrophy in claimant's left leg (App. 119); that he found no reflex changes, which changes are present sometimes in such cases; that claimant had a marked, chronic weakness of the spine because of the malformation with which claimant was born (App. 119, 120); that such a malformation usually tends to make an unstable back; that he did not determine from the appearance of the adhesions how old they were (App. 120); that a congenitally weak spine probably tends to develop adhesions more than the average, and adhesions sometimes result from infection; that the possibility exists that *claimant's adhesions were due to either infection, congenital weakness, or injury* (App. 121); that, *from the history given by claimant,* he thinks the adhesions occurred at the time of the injury two years previously, but he could not tell their cause from looking at the spine; that it appears that claimant's pre-existing condition had been aggravated by the second injury of October 10, 1953 (App. 122).

At the hearing before the deputy commissioner

on December 10, 1954, *Dr. Bernard E. McConville*, a witness called by the appellee Employers' Mutual Casualty Company (the insurer in 1951) testified in part as follows:

That he has specialized in orthopedic surgery since 1937 (App. 133); that he reviewed the report of Dr. McLemore (App. 134); that claimant's sixth lumbar vertebra is a congenital malformation and any such malformation tends to weaken, mechanically, the structure of the spine and make it prone to injury (App. 136); that such congenital defect developed since the claimant was born through the formative years; that the deformity of claimant's facets, which may be likened to a pair of door hinges, is also a part of the congenital malformation or weakness of the joint (App. 136); that since birth claimant had a weak lumbosacral joint which caused intermittent periods of back discomfort and made him more prone to injury (App. 137); that adhesions are scar tissue formations that develop secondarily to an inflammatory process (App. 138); that claimant may have had "minor disability" from the strain of May 30, 1951, after which he was able to carry on the work of a longshoreman for over two years, but because of his complete collapse following the injury of October 10, 1953 *it is his opinion the second injury was the producing factor of claimant's present disability* (App. 140);

that he does not believe that claimant's adhesions, diagnosed post-operatively as adhesive arachnoiditis, would have existed since claimant's first injury without disabling him before his complete collapse which followed immediately after the injury of October 10, 1953 (App. 141); that such condition developed as a result of a definite episode [the second injury], the impingement of the nerves going down claimant's left leg apparently being the cause of his immediate work stoppage; that he feels such condition was due to the second injury because the claimant had been able to work for over two years following the back strain of May 30, 1951 (App. 141); *that he does not think such adhesions could have existed since the first injury since claimant would have had more of a reaction if they had so existed; that an inflammatory process such as adhesions has a relatively short period in which it develops and has either to burn suddenly or burn out* (App. 141); that claimant is prone to have back pain from posture [such as the pain following the back strain of May 30, 1951 as to which claimant testified] (App. 142); that claimant could have had a disability from the first injury or over the years he may have gradually developed a weakness of his back necessitating a back brace (from the congenital condition) but claimant "*very distinctly had a severe second injury*" (App. 146); that the fact that claimant, on examina-

tion by Dr. McLemore, had definite muscle spasm after being in a cast (following the second injury) would indicate that claimant "had something severe" [resulting from the second injury] that has happened over and above [claimant's condition following the first injury], because if he had had a severe degree of muscle spasm any place * * * he would not have been able to work [following the first injury] (App. 150); that he does not think claimant's adhesions could have existed since the injury of May 30, 1951, but thinks they would have occurred *within a few weeks before the time Dr. McLemore operated on the claimant* (App. 153); that most of the pain in claimant's *congenitally deformed back would be muscular pain, which is the reason claimant got relief from wearing a belt or back brace or from sleeping on a hard bed, thereby allowing the muscles to relax* (App. 154); that the nerve pain in claimant's leg could have been caused by increased muscle tightness in the area of weakness in claimant's back (App. 155); that persons with sacroiliac slip get a kink in their back and neuralgia down the leg but it is not a definite pinching of the nerve root so as to give a definite, permanent pattern of pain (App. 156).

There was received in evidence as Exhibit No. 1 of the Employers' Mutual Casualty Company the deposition of Dr. J. H. Shelton taken on September 7, 1954

at Anchorage, Alaska (App. 41). This deposition shows in effect that Dr. Shelton saw the claimant at the hospital following his injury of May 30, 1951 and diagnosed claimant's condition as *sprained muscles of the back.* No x-rays were indicated and none were taken. The claimant was back to work in about a week and Dr. Shelton saw him no further, after having prescribed heat and rest. No type of back brace or support was prescribed by Dr. Shelton, and *he had no reason for thinking that the claimant suffered any permanent damage to his back.* Dr. Shelton's report to the Alaska Industrial Board attached to the deposition shows that the injury on May 30, 1951 consisted of "*sprained muscles of the back*", that claimant was admitted to the hospital on June 3 and discharged on June 6, 1951, that no further treatment was needed and that patient would be able to resume his regular work on June 8, 1951.

There were also received in evidence (App. 1 et seq.) depositions of claimant's co-workers on their observation of claimant at work; they do not show much beyond the fact that claimant had *two* injuries and that after the first injury claimant *worked his regular shift* "and worked right along as good as anybody" (App. 5, 9, 19).

In the above circumstances the deputy commis-

sioner found that the injury of October 10, 1953 and not the injury of May 30, 1951 was the cause of claimant's disability, subsequent to October 10, 1953.

Appellant's brief reads (pp. 5, 9) as if the deputy commissioner heard one claim, that which related to the 1951 injury, but decided the other, the one relating to the 1953 injury. A reference to the opening page of the proceedings before the deputy commissioner (App. 64) will show that the deputy commissioner as well as all the parties were well aware that as the deputy commissioner stated: "This hearing * * * is being held for the purpose of *determining the liability of the employer and insurance carrier, or insurance carriers, in connection with the injuries* the claimant, Clarence L. Caldwell, is reported to have sustained on *May 30, 1951, and October 10, 1953* * * *"

The statements made for the record at the opening of said hearing both by the attorney for the appellee Employers' Mutual Casualty Company (App. 66) and by the attorney for the appellant Continental Fire and Casualty Company (App. 67) indicate that they understood that the issue was which injury was the cause of the employee's present disability.

The testimony which follows the above statements fully confirms the understanding of all the parties. Moreover, the taking part in the proceeding before the

deputy commissioner by the attorney for the appellant and all the evidence produced by it at said hearing, medical and otherwise, would have been meaningless and in fact would have had no place at said hearing if claimant's claim for the injury of October 10, 1953 (when appellant was the insurer) were not before the deputy commissioner for adjudication.

Therefore, because the reporter entitled the transcript of hearing (App. 63) with one title instead of two it does not follow that the hearing pertained only to one claim when the entire record speaks otherwise.

ARGUMENT

I.

The Deputy Commissioner Was Not Required to Adjudicate the Claim for the 1951 Injury First.

It is to be noted that appellant insurer admitted in the complaint filed below the claimant sustained an injury on October 10, 1953 while employed by its insured (R. 11) and appellant-insurer did not allege that the findings with reference to the disability and loss of wage earning capacity resulting from such injury are not supported by the evidence. In the absence of such allegations said findings of fact in the compensation order should be accepted as true. *Anderson v. Hoage*, 63 App. D.C. 169, 70 F. 2d 773 (1934);

Luckenbach Steamship Co., Inc. v. Norton, 96 F. 2d 764 (C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson,* 141 F. 2d 964 (C.A. 5, 1944).

If then appellant-insurer did not challenge any of the findings in the order complained of relating to the 1953 injury, when such insurer was on the risk, it would seem that its contention that the deputy commissioner should first have decided the claim relating to the 1951 injury, when it was not on the risk, is without merit since it was not a "party in interest" with reference to such earlier claim. See Section 21(b), Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Sec. 921 (b)). It is accepted law that a person may take legal action only with reference to some act or omission which affects his legal rights. What action the deputy commissioner might take or might have taken with reference to a claim for an injury sustained in 1951 in which the appellant-insurer had no legal interest whatsoever would not be of any legal concern to it.

The compensation order complained of (which admittedly is correct upon its face) is not "not in accordance with law" [the only basis for setting aside an order under Section 21(b) of the Act (33 U.S.C. Sec. 921(b)] merely because there is another unadjudicated claim before the deputy commissioner involving another injury.

But aside from the correctness from a strictly legal aspect of the deputy commissioner's action in deciding the claim for the 1953 injury first, it was proper also administratively. When two claims are filed for two separate injuries and the issue is as to which employer or which carrier is liable, it is good administrative practice first to issue the compensation order which finds liability, withholding the issuance of the order absolving from liability until the first order has become final. Otherwise, if both orders are issued simultaneously and the order awarding compensation should be set aside upon judicial review, the employee (unless he took an appeal from an order with which he is satisfied) would find that he had lost the right to compensation as to both injuries, notwithstanding that he was clearly entitled to compensation from one or the other employer or carrier. See *Tyler v. Lowe*, 138 F. 2d 867 (C.A. 2, 1943) where such a situation existed.

Moreover, even if the deputy commissioner had adjudicated the claim for the 1951 injury "before he adjudicated the claim of injury of October 10, 1953" as appellant-insurer contends that he should have done, it may be assumed that the deputy commissioner would have rejected the claim for the 1951 injury for any disability which existed subsequent to the 1953 injury consistent with the finding in the compensation order

appealed from "that the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability rather than the minor injury he sustained on May 30, 1951." Such adjudication of the 1951 claim would not have affected appellant-insurer legally because as stated it did not pertain to a claim in which such appellant was a party. Appellant-insurer was entitled to have a finding as to the 1951 injury only insofar as it related to the question of disability after the 1953 injury. The finding in this respect was complete:

> "* * * the injury of October 10, 1953, was the precipitating cause of the claimant's *subsequent* disability rather than the minor injury which he sustained on May 30, 1951, * * *" (R. 23, 24). (Italics supplied).

Notwithstanding the quoted finding, appellant states (p. 5) that "no reference is made to the 1951 injury or to the claim filed therein in the award made by the Deputy Commissioner" but on page 11 states that "the [deputy] commissioner acted arbitrarily in holding the second injury the sole cause of claimant's disability."

As stated above appellant-insurer did not challenge said finding.

Since the only issue raised by appellant in the court below was that the deputy commissioner

should have decided the claim for the 1951 injury first, this Court is not required to consider other issues not raised in the court below. *Moore Dry Dock Company v. Pillsbury, supra.* However we shall briefly refer to the other issues raised here for the first time in the event that this Court should consider them timely raised.

II.

Section 8 (f) Not Applicable

Appellant contends (p. 10) for the first time that Section 8 (f) of the Act (33 U.S.C. Sec. 908 (f)), is applicable and that appellant should "provide compensation only for a disability caused by the subsequent injury." The difficulty with appellant's argument is that the deputy commissioner found (and the finding has not been challenged) that the second injury was the sole cause of claimant's disability. Therefore appellant as the insurer at that time is called upon to pay *only for the disability caused by the second injury,* which as stated was found to be the sole cause of such disability.

Appellant may be confused as to what constitutes "disability". The word itself is defined in Section 2 (10) of the Act (33 U.S.C. Sec. 902(10)), as the "incapacity *because of injury* to earn the wages which

the employee was receiving at the time of injury in the same or any other employment." (Italics supplied). Physical disability alone is not sufficient.

The record shows that claimant did not deny that in the year 1952 he worked *more* than in the year 1951 when the first injury occurred (App. 79), that in 1953 he earned $5,200 for ten months compared to $7,500 in 1951 for twelve months (the work is not steady, App. 3, 79). Moreover claimant's earnings of $7,500 in the year *1951* which includes seven months following the May 1951 injury does not indicate a disability for work related to that injury.

Appellant's contention (p. 17) that claimant was given easier tasks after first injury is not borne out by the record to which appellant refers. A reference to the pages cited in support of said contention (App. 99, 100) shows no such evidence. Moreover it was for the deputy commissioner as the trier of the fact to determine the credibility of the witnesses including the claimant as to his ability to work following the first injury *Wilson and Co. v. Locke*, 50 F. 2d 81 (C.A. 2, 1931); *Hudnell v. O'Hearne*, 99 F. Supp. 954 (Md. 1951). And finally claimant's inability to work, if such there was, prior to the 1953 injury may have been due to a weakness which developed from the congenital condition (App. 146). [This would also be

consistent with the high earnings in the months of 1951 immediately after the injury and with the fact that he first began to wear a back brace in the fall of 1952 over a year after the first injury (App. 5, 95).] If the disability was due to a congenital condition it was not a disability "from injury" as defined in the Act such as would entitle claimant to compensation therefor.

Assuming arguendo however that the first injury did have a residual disability which resulted in a loss of earning capacity, it is a reasonable inference that the wage which the claimant was receiving in 1953 at the time of the second injury represented his earning capacity at that time and took into consideration whatever effect the first injury left with him. It was not intended by so-called "second injury" provisions such as Section 8(f) that an insurer of an employer in whose employ the earning capacity at the time of the second injury was totally destroyed should be relieved of liability in part because the employee's earning capacity, due to a previous disability, was less than a normal person's. Such decreased earning capacity presumably has already been discounted in the employee's wage rate at the time of the second injury. *Schwab v. Emporium Forestry Co.*, 153 N.Y.S. 234, aff'd 111 N.E. 1099. Otherwise such an employee would have to pay twice for his previous disability:

first, in wage reduction due to his inability to perform as a normal person and second, in a reduction in the compensation which a normal person would receive, that is based upon the actual wage rate.

[Appellant's assertion (p. 18) that "the deputy commissioned himself felt there was disability arising out of the first injury (App. 151)" is not borne out by the record as a reference to the cited page will show.]

III.

Common Issue

The deputy commissioner had before him an issue which is quite common in compensation law although frequently difficult of solution, namely to determine which of two successive incidents is responsible for claimant's disability. It has been uniformly held that a determination by the trier of the fact either that a disability was a recurrence of a prior injury or was caused by a new and independent injury is one of fact and will not be disturbed if there be any competent evidence to support the finding. *Head Drilling Co. v. Industrial Accident Commission*, 177 Cal. 194, 170 P. 157 (1918); *Prince Chevrolet Co. v. Young*, 187 Okl. 253, 102 P. 2d 601 (1940); *Borstel's* case, 307 Mass. 24, 29 N.E. 2d 130 (1940); *Billington v. Great Lakes*

Dredge & Dock Co., 263 A.D. 1040, 33 N.Y.S. 2d 703 (1942); *Grieco v. C. R. Daniels, Inc.*, 17 N.J. Misc. 393, 9 A. 2d 671 (1940); *Taylor v. Federal Mining & Smelting Co.*, 59 Idaho 183, 81 P. 2d 728 (1938); *Hajek v. Brown*, 255 A.D. 729, 6 N.Y.S. 2d 821 (1939); *Maloney v. Utility Roofing Co.*, 45 N.Y.S. 2d 746 (1944), affirmed 293 N.Y. 915, 60 N.E. 2d 127; *Sutton & Sutton v. Courtney*, 203 Okl. 590, 224 P. 2d 605 (1950).

In the *Head Drilling Co.* case, *supra*, the Court said:

> "We are of the opinion that a subsequent incident or accident aggravating the original injury may be of such a nature and occur under such circumstances as to make such aggravation the proximate and natural result of the original injury. Whether the subsequent incident or accident is such, or should be regarded as an independent intervening cause is a question of fact for the commission, to be decided in view of all the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld."

In the *Prince Chevrolet Co.* case, *supra*, the Court said:

> "As to whether the disability resulted from a prior injury or is an aggravation of a prior injury or is caused by a new and independent injury is a question of fact solely within the province of, and for the determination of, the State Industrial Commission, and if there is any competent evi-

dence to sustain the finding an award based thereon will not be disturbed." (Citing cases).

In *Maloney v. Utility Roofing Co., supra,* which also involved two back injuries, the court said that even though the employee at the time of the second injury had not fully recovered from the first injury, the evidence authorized compensation for the second injury alone. Accord: *Pittsburgh Plate Glass Co. v. Wade,* 197 Okl. 681, 174 P. 2d 378 (1946).

The correctness of the principle that the second injury is the compensable injury in respect to the subsequent disability regardless of the fact that but for the first injury the second might not have occurred was recognized by this court in *Pillsbury v. Liberty Mut. Ins. Co.,* 182 F. 2d 743 (1950), in which it was indicated that where there are two independent injuries the finding that the *two* employers are responsible for the disability *was incorrect.*. In other words if there are two independent injuries, the second injury of which produces the disability, such second injury is the compensable injury notwithstanding that the weakened condition of the employee makes the second injury possible.

In re Franklin, 129 N.E. 2d 906 (Mass. 1955).

Assuming, however, that under the law the determination as to the injury responsible for the dis-

ability depended upon the choice between conflicting inferences, the inference drawn by the deputy is not subject to review and will not be reweighed. *C. F. Lytle Co. v. Whipple*, 156 F. 2d 155 (C.A. 9, 1946); *Contractors, PNAB v. Pillsbury*, 150 F. 2d 310 (C.A. 9, 1945); *Liberty Mut. Ins. Co. v. Gray*, 137 F. 2d 926 (C.A. 9, 1943).

IV.

Findings Of Fact Unnecessary

Appellant complains that the court below failed to make Findings of Fact and Conclusions of Law. Rule 52 (a) of the Federal Rules of Civil Procedure (which are made applicable to proceedings for judicial review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act by Rule 81 (a) (6) of said rules) provides that Findings of Fact and Conclusions of Law are unnecessary on decisions of motions under Rule 12 and 56. The decision here was on a motion to dismiss under Rule 12.

Moreover aside from Rule 52 (a) of the Federal Rules just referred to, as the court said in *Steamship Terminal Operating Corp. v. Schwartz*, 1943 *Amer. Maritime* Cases 90, affirmed 140 F. 2d 7, there could be but one finding; that the commissioner's findings are supported by evidence and one conclusion of law; that the complaint must be dismissed.

CONCLUSION

In view of the above it is respectfully submitted that the compensation order complained of is in accordance with law and that the order of the court below sustaining it should be affirmed.

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